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The Freedom of Information Act and National Security Secrecy: How It's Working After Two Years

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Although we are regularly told that our republican form of government is based on the informed consent of the governed, it was not until the passing of the Freedom of Information Act in 1966 that the public had, for the first time, a legal right to some of the records that federal agencies had on hand. And it was not until November, 1974 that Congress passed — over a presidential veto — amendments to the FOIA which gave the public an affirmative, if also limited, right to information dealing with the national security. Information may now be withheld only if it is properly classified according to the executive's own standards, and judges have the power to decide anew whether information had in fact been properly classified.

It is now two years since Congress established this right of access, and we are now in a position to make some judgments about how the Act is doing as a wedge into what had at one time been the executive branch's exclusive preserve. This article narrows its focus to two areas of the FOIA in operation: It is a progress report first on the successes of the FOIA in releasing information from the government, and second, on how the courts have been dealing with the

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.

THOMAS PAINE

conflicting claims in the super-secret area known as "national security interests." People who are interested in a more general overview of the Act should read the November, 1975 issue of *First Principles*.

FOIA — Expanding the Public's Access

There are admittedly many problems with how the FOIA is working out — there are numerous signs of non-compliance, of foot-dragging with the statutory time limits, and of agencies abusing the discretion that Congress gave them on whether or not to waive fees. And some agencies produce things in a more spritely fashion once a lawsuit is filed, meaning that people who are not in a position to sue don't have the full advantages of the provisions of the FOIA.

But there is no question that it has greatly increased the flow of information to the public. You might say that one measure of its effectiveness is in the way that executive branch agencies are complaining about the "burden" of the act, that they are so busy with FOIA requests that it prevents them from spending their time on "their real tasks." (They overlook, of course, that Congress decides what their real functions should be, and that answering FOIA requests has become one of those assigned functions. At the same time the complaints are an indication that the bureaucrats are now taking FOIA requests seriously, something which the 1966 version of the act — with its open-ended time limits, its lack of ready remedies in court, its prohibitive fees for search, review, and copying, and its broad exemptions — did not force them to do.

But even with a conspicuous lack of enthusiasm for the public's right to information, a great deal of information is, for the first time, coming out of the executive branch. Some of it is trivial, but some of it is incendiary, and some of it is the sort of thing that lawsuits for damages and congressional investigations are made of. Two lawsuits on the docket of the Project on NS&CL provide examples of this. One is the case of Nasser Afshar, a naturalized American citizen who publishes a bi-lingual newspaper in the U.S., the *Iran Free Press*. Under the FOIA Afshar received a copy of a telegram from Richard Helms, former Director of Central Intelligence and ambassador to Iran, stating that the Shah wanted the *Iran Free Press* closed down, and that the U.S. government was, in spirit at least, willing to see what it could do:

> *In fact, in last two years embassy had several times raised with Department question whether Iran Free Press could be closed down. Matter had been carefully studied but lawyers had concluded that under U.S. laws there was regrettably no basis for such action.*

The second suit is that of William Albertson. In an FOIA request dealing with FBI operations against the Communist Party, there was one place where the censor's pen evidently slipped, and documents were released which named Albertson as the victim of an FBI "snitch jacket" which convinced his colleagues that he was an FBI informer. He was drummed out of the party, disgraced, and spent the rest of his life trying to prove that he had been innocent.

The Project has a growing library of important documents that have been obtained under the FOIA: some have been the fruit of court actions, but most have not. Some are of interest primarily to scholars, but most feed directly into current debates — intelligence agency abuses, foreign policy decision making, and the secret directives which govern the intelligence agencies. Many documents contain deletions, but what is released is often important in itself, and sometimes provides a trail to other, related documents and additional requests. Briefly, we list here examples of the kinds of information the Project has on file:

- Internal reports about the ongoing need to revamp the intelligence bureaucracy, such as the "Blue Ribbon Defense Panel Report to the President and the Secretary of Defense (July 1, 1970)," which produced a series of reports stating that military intelligence collected more information than it could ever use; and "A Review of the Intelligence Community" with a familiar conclusion that the intelligence bureaucracy needs to be reorganized.

- "Studies in Intelligence," a classified internal CIA publication, which includes book reviews and articles. It provides a view of the world from within Langley, and confirms things such as the reliability of Philip Agee's *CIA Diary*.

- The secret law which governs the intelligence agencies. For example, the secret testimony before Congress when the CIA was being set up; the Delimitation Agreement of 1948 in which the CIA and FBI each staked off their own turf; National Security Council Memorandum 10/2, June 18, 1948, which gave the CIA its secret charter "to plan and conduct covert operations," and which established

the "plausible denial" for undertaking actions that can't be admitted to publicly; the National Security Council Intelligence Directives (NSCIDs) from 1947 to 1972, which include a decision (in NSCID 7, 1948) for the CIA to get into "domestic exploitation" even though the CIA spokesmen assured Congress that the CIA would not operate domestically; and a memoranda from the CIA's General Counsel that, contrary to what was stated publicly, the National Security Act did not give CIA authority to carry out subversion and sabotage.

• And there is a growing list of documents dealing with questionable intelligence agency operations. In order to make the need for external controls seem unnecessary, the agencies are all, to greater or lesser degrees, trying to give the impression of internal housecleaning. This means that they are sometimes willing to come forward with documents on these operations, such as: synopses of Hoover's legendary blackmail files on public figures in the U.S.; CIA assassination plots against Trujillo, Castro, leaders in South Vietnam, and leaders in the Belgian Congo; the files which Colby referred to before the Senate Appropriations Committee in a report dealing with domestic operations, such as their report "Restless Youth" (which found that there was no foreign connection to domestic political upheavals); the Colby Report to President Ford that was the response to Seymour Hersh's revelation in December, 1974 that the CIA had carried out a massive domestic surveillance program; the Huston Plan; the ongoing search for the missing foreign link to domestic political upheaval; a memo from the CIA Inspector General to the DCI warning him about "Potential Flap Activities," i.e., what he needed to keep the lid on; the CIA's file on Lee Harvey Oswald's involvement with Cuba; and the list goes on.

• For students of the view of foreign policy from the State Department, many new records are now available: Kissinger's background press conferences dealing with the SALT agreements and the Middle East; the State Department briefing paper which gave the American government's internal interpretation of the Vietnam Peace Agreement; the assurances to the government of South Vietnam on what U.S. reactions to North Vietnamese violations of the ceasefire agreement would be; documents about the cancelled 1960 Eisenhower trip to Japan; and documents related to the American decision to intervene in Korea.

• The FOIA can also be used to dislodge documents which have been the focus of public attention in their own right, such as the Negotiating Volumes of the Pentagon Papers.

Many of the above documents are from the roster of requests that the Project on National Security and Civil Liberties has put together, while others are those that other people have requested and dislodged from the bureaucracy. The Project library has put together a list of abstracts of the contents of these and many more documents released under the FOIA, and which are available from the Project for 10¢/page. This compendium also offers an example of how the FOIA can be used systematically to expand the public's knowledge in areas which were completely secret before the 1974 amendments went into effect. The "Abstracts of FOIA Documents" can be ordered from the Project by using the blank on page 15 of *First Principles*.

Litigation for National Security Secrets

The FOIA has given the courts the power of *de novo* review of decisions by agencies to withhold documents, which means that they now have the power to examine documents themselves, override the decisions of the executive branch, and release whatever they determine is appropriate under the provisions of the Act. But giving judges this power is not the same as having them exercise it fully. The FOIA requires *de novo* review, but it leaves it up to the judge's discretion whether to overrule the agencies.

We now turn to this issue and to a number of other questions which have come up in the course of litigation. These include the standards for withholding information under (b)(1), the scope of judicial review, the courts' traditional hesitance with political questions, the decision to exercise the right of *in camera* inspection of the documents, the problem of maintaining an adversary process when litigating for secrets, and the scope of discovery which the courts have decided is necessary. From (b)(1) and the general problems of FOIA/National Security litigation, we move to exemption (b)(3), the most recently amended provision of the FOIA, which allows the government to withhold information because of authority granted by other statutes and, in particular, how it ties into the claims of the CIA and NSA. We then offer a brief discussion of two aspects of exemption (b)(7), which

covers investigatory records: first, the problem with the time limits, and second, whether the CIA can properly claim an exemption intended for law enforcement agencies.

Classified Information — Exemption (b)(1)

The 1974 amendments to the Freedom of Information provided that only *properly* classified information can be withheld from the public. Exemption (b)(1) of the Act states that its provisions do not apply to matters which are:

> *(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.*

Congress could have accepted the Supreme Court's invitation in *E.P.A. v. Mink*, 410 U.S. 73 (1973) to establish its own classification system, but instead it opted for using the system which already existed, and which is laid out in Executive Order 11652. That order was promulgated by Richard Nixon in response to the protest against massive overclassification which followed in the wake of the Pentagon Papers. The classification system could at any time, however, be changed — either by a new Executive Order or by an act of Congress.

In order to be "properly classified" according to the terms of the Executive order, a document must meet its substantive and procedural criteria. First — and this is obviously where the operating definitions are open to intense dispute — a document must contain information which could harm the national security, and second, the document must have actually been classified according to the executive branch's own procedures.

Substantive Criteria — Harm to the National Security

In order to be withheld a classified document must meet at least the standard for "Confidential" — that the unauthorized release of the information "could reasonably be expected to cause damage to the national security." The standard of the preceding Executive Order, EO 10501, had been much broader; Confidential was defined as "defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation." On paper (if not in practice), "could be prejudicial" is far more general and speculative a standard than "could reasonably be expected to cause damage." Explaining the distinction, Nixon stated, "Heretofore, material could be classified if the originator had any expectation of such damage however remote." (Public Papers of the Presidents, Richard Nixon, 1972 #29, Page 401.) Following the criteria of EO 11652, an official must presumably make some determination about not just the abstract possibility, but the concrete *probability* of harm. But no where does it try to measure the probability of harm against the importance of the information to the public.

Procedural Criteria For Withholding Documents

The courts have held that the government must show them that the classification criteria of the Executive Order are met before information will be granted a (b)(1) exemption. According to the FOIA Conference Report, material can be withheld only if it is properly classified "pursuant to both procedural and substantive criteria contained in such executive order" (House Report 93-1380, at 12). And even before the passage of the 1974 amendments, the D.C. Circuit had held that if an agency failed to follow the procedures of the Executive Order, they would compel disclosure. *Schaffer v. Kissinger*, 505 F.2d 389 (D.C. Cir. 1974).

The EO specifies that a properly classified document must be at least 1) "reasonably be expected to cause damage to the national security," 2) classified by an authorized official, 3) be properly marked with classification, classifier, and indications of which portions are not classified, 4) show whether the document is scheduled to be downgraded, and if so in how many years, and 5) what the limits on internal distribution of the material are.

In both *Schaffer* and more recent cases, *Halperin v. National Security Council* and *Halperin v. Secretary of State*, courts have found that plaintiffs are entitled to discover whether these procedures were in fact followed.

In *Halperin v. Secretary of State*, #75-0674 (D.D.C.

May 28, 1976), the court held that documents which where not properly classified could not be withheld under exemption (b)(1). This case provides both a variation of the problem of getting the government to confirm what is a matter of public knowledge and an interesting example of how little attention the government has paid to the criteria of the Executive Order. The lawsuit is for deletions from the transcript of a Kissinger press conference on the SALT agreements. The transcripts were not classified until after the FOIA request was made; in fact, there were foreign as well as American press representatives at the conference, none of whom had security clearances. The government has argued that there is instead an understanding with the press that they will not attribute information from a backgrounder to the Secretary of State, but no where in the Executive Order or the State Department regulations is there an official arrangement to that effect. At any rate, the State Department maintains that it is the fact that the Secretary made certain statements, and not the content of the statements, which is secret. Yet, both the information in the deletions and their attribution to Kissinger are already public knowledge. In a *Washington Star* article of August 10, 1975, Admiral Elmo Zumwalt, former Chief of Naval Operations, wrote:

> *[T]here continues to be evidence that Secretary of State Henry Kissinger secretly gave away Backfire [a Soviet intercontinental bomber] even before Vladivostok. In his December 1974 backgrounder, and on return from Vladivostok, he told reporters it had been agreed that Backfire would not count against the Soviets' overall limit.*
>
> *When a majority of NSC members objected to this one-sided concession, Kissinger "reversed" his position; when the December backgrounder was, several months later, pried from his office under the Freedom of Information Act, it was noted that the text had been altered to eliminate Kissinger's earlier admissions on Backfire.*

District Court Judge June L. Green found that "Defendant's *post hoc* justifications do not negate the fact that the deletions were not classified in accordance with the Executive Order," and granted summary judgment to the plaintiff. She also noted that the fact that the backgrounders were available to reporters without security clearances "buttresses plaintiff's contention that the deleted materials were not such as 'could reasonably be expected to cause damage to the national security,'" but even so it wasn't necessary for the court to reach the question of whether the information would have been classifiable, only that the proper procedures had not been followed.

The legal issue now awaiting the decision of the D.C. Court of Appeals is the question of what happens when the executive does not follow its own procedural rules for classification. The government's position has been that although some procedural errors might require the release of the information, in general errors in the classification procedure can be corrected in response to an FOIA request, if the information is important. If courts take the executive branch's position, it would make the rules laid down by the Executive Order a matter of discretion, and the congressional reliance on the standards of EO 11652 would be meaningless.

Segregable Portions

In *Florence v. DoD*, 415 F. Supp. 156 (D.D.C. 1976), we have a clearer instance of the government trying unsuccessfully to classify information which is not classified. The plaintiff sought — and got — the list of titles contained in the Technical Abstracts Bulletin (TAB) of DoD projects. None of the titles were originally and by themselves classified, but DoD classified the list as a whole. District Court Judge Green ruled that since segregable portions must be released under the FOIA, and since each title was unclassified and therefore segregable, the total list had to be released.

Judicial Review

In the national security area of FOIA litigation, the central issue is the extent to which judges are willing to exercise their power of *de novo* review — a fresh determination based on their own judgment — as to whether the documents are correctly classified. It was on this point on which Ford vetoed the 1974 amendments. The administration wanted to limit the courts' power to be able to determine only whether a classifation was "reasonable," *i.e.*, somewhat better than arbitrary and capricious, and it balked at giving the judiciary a power to classify which could override the executive's. As the D.C. Circuit noted in its decision in *Zweibon v. Mitchell*, 516 F.2d 594 (1975), when Congress overrode the FOIA veto it gave a

vote of confidence in the competence of the judiciary . . . that judges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation.

And since most national security FOIA cases are conducted in the D.C. Circuit, it is possible that what was dicta in a warrantless "national security" wiretapping case (see the October 1975 issue of *First Principles*) could become the standard for judicial review of FOIA cases.

Decisions so far, however, indicate that the confidence of the judiciary does not match that of the Congress. The results vary in degree from judge to judge, but courts have been consistently unwilling to second guess the claims of the executive branch. Cast adrift without a clear definition of what actually constitutes a necessary and legitimate national security secret, the courts have so far taken a cautious stance, insisting that there be public justifications as to the reasonableness of the classification, but not going so far as to make a fresh determination of the correctness of the classification. In effect, they have been implementing the position taken in the Ford veto rather than in the congressional override.

This judicial reluctance to undertake *de novo* review of classified documents gets encouragement from the government attorneys, who have taken three tacks in limiting judicial review. First, the government puts great emphasis on the language of the House report (H.R. Rep. 1380, 93rd Cong., 2d Sess. (1974), at 12) that the courts should accord "substantial weight" to the opinions of the federal agencies in making their *de novo* determinations; agency lawyers urge in effect that according "substantial weight" means accepting those opinions as the determining factor. Second, it relies heavily on the language in *Knopf v. Colby*, 509 F.2d 1362 (4th Cir.), which put strict limits on the right of courts to determine whether information was in fact classified, and which ended up sanctioning the first politically censored book in the history of the United States, *The CIA and the Cult of Intelligence*. And finally, government attorneys still cite the Conference Report of the Act — which would have applied a standard of "reasonableness" to classification — and neglect to mention that this language was specifically overturned in a later floor fight in the Senate, which adopted the standard of "properly classified."

Courts have traditionally avoided deciding "political questions." And clearly, the kind and degree of national security and policy secrecy is an extremely political question, particularly when the agencies come forth with lengthy affidavits foretelling imminent doom if documents are released. The courts become hesitant about pitting their judgment against the "experts" — even where the public's interest in knowing is clear. In *Klaus v. Blake and CIA*, #76-1274 (D.D.C.) (a suit for deletions from documents dealing with CIA authority to conduct covert activities against foreign nations) Judge Gesell wrote,

The Court recognizes that a vital issue of public policy, on which there are sharp differences and a wide range of views, is presented. These are matters, however, with which the Court should not and cannot become involved unless specifically so directed by Congress.

A more concrete example of this came up in *Halperin v. Colby*, #75-0676 (D.D.C. June 4, 1976). Judge Smith noted that Congress has in the past declined to take the political step of publishing the gross CIA budget figure, and that CIA depositions claimed that, for foreign intelligence agencies, the gross figure would be the missing piece in the intelligence jigsaw puzzle. He held that

In its de novo *determinations concerning documents' disclosability under exemption (b)(1), the Court must recognize the unique insights that resposible Executive agencies have as to the potential adverse effect of publication."*

The recommendations of the recent congressional investigations that the gross budget figure should be made public will not be resolved, it appears, by a political decision of the courts.

In Camera Inspection of the Documents. The courts have not merely been reluctant to replace the judgment of executive branch officials with their own; they have often been reluctant even to approach that issue by examining the documents *in camera* (in secret in the Judge's chambers). Judicial reluctance was unapologetic in *Klaus v. Blake and CIA* (Decision, Memo, and Order Nov. 4, 1976). Judge Gesell granted summary judgment to the CIA without himself inspecting the deletions. The court held that it would not exercise its power of *de novo* review but would insist on only a showing that the agency had made a review of the documents and determined they should remain classified:

> *. . . the Court has concluded that it will not hold an* in camera *proceeding where an adequate affidavit demonstrating that the documentary material claimed exempt on grounds of national security has been conscientiously reevaluated by a classification officer, and remains classified "Secret" or "Top Secret."*

The court rejected the idea that it should go over the brief deletions in this case to determine if there were some additional segregable portions. Gesell found the idea — which Congress made a matter of the judge's discretion — an excessive burden on the court.

But, where there had not been a fresh review and the decision to withhold the documents was based instead on a general policy decision by officials who had not looked at them, *in camera* inspection has been held necessary. *Military Audit Project v. Bush*, 418 F. Supp. 880 (D.D.C. 1976) (Gesell, J.).

Getting Enough Information to Litigate — Discovery

The Freedom of Information Act contains one as yet unresolved catch-22: although the burden of proof is on the government, as long as its attorneys have the documents in question and the plaintiffs do not, it has a tremendous advantage in making its arguments to the court. The government of course opposes discovery (the process in litigation where a court order gives one side access to certain kinds of evidence which the other side has), but the courts have been generally unsympathetic, and have granted fairly extensive discovery of the facts surrounding the information which is sought. As the court saw it in *Klaus v. National Security Council*, Civ. Action No. 75-1093 (D.D.C., Order, Sep. 18, 1975), "The government offers no reason why the court and the plaintiffs must continue to stumble around in the dark." And in *Military Audit Project v. Bush* the court listed the categories of information which the government could put into the public record: a public index (i.e., *Vaughn* showing); an indication how and when the material was classified; the extent of declassification or recent review; whether there were segregable portions which could be released; and the nature of the security problem. Brief, conclusory statements were not sufficient.

In *Phillippi v. CIA*, #76-1004 (D.C. Circ., Nov. 16, 1976), the Court of Appeals held that public, rather than *in camera*, affidavits were required from the government, so that their arguments could be tested by the plaintiff through "appropriate discovery when necessary to clarify the Agency's position."

And in that most chimerical of situations, where the government says that the documents in question don't exist, a court held ". . . plaintiff was entitled to insist on his interrogatories being answered and that they should not have been dismissed by the trial judge as oppressive." *Weisberg v. Department of Justice*, #75-2021 (D.C. Cir. July 7, 1976), appealed from #75-0226 (D.D.C.)

Ex Parte in Camera Proceedings

While on the one hand *in camera* examination is part of the expanded power of the courts to overrule the classification decisions of the executive branch, *ex parte in camera* (taking place in the judge's chambers with only one party, the government, being able to participate) inspection of documents also means that the judge makes his or her decision without being able to hear equally detailed or expert arguments on behalf of disclosure. When the plaintiffs are excluded from offering informed opposition, the government's burden of proof obviously becomes much easier.

As a result, when trying to prove that documents are properly classified, the government strategy is to establish maximum secrecy in the court proceedings. Often, they move to present affidavits, and not just the documents at issue, *ex parte in camera* to argue that the material should remain classified.

This strategy side-steps the adversary system of justice, and puts the judge in the uncomfortable role of having to take on the role of advocate for the plaintiffs. Judges have traditionally been leery of complicating their task by having to do this. But so far they have not used the solution which is generally used in other kinds of cases — granting plaintiff's attorneys access to the documents, but under a protective order and court sanctions if they reveal information learned from the materials.

Protective orders in FOIA cases have been sought repeatedly but denied. In *Military Audit Project v. Bush*, 418 F. Supp. at 878, after giving good language on the problem ("Is it not alien to our entire jurisprudence that courts are to function *ex parte* in private without benefit of the adversary process?"), Judge

Gesell then rejected on three grounds the plaintiff's request for a protective order. He suggested that it violated the attorney/client relationship; he questioned whether plaintiff's counsel would be reliable; and he noted that many FOIA litigants file pro se (as their own attorneys).

Establishing the priority of protective orders in FOIA litigation offers some interesting variations in the drama of litigating for secrets. The usual assumption is that the government is the only party with the information, but this is not the situation in two of the Project's lawsuits.

In *Halperin v. DoD*, #76-1203 (D.D.C.) the plaintiff seeks deleted sections from the Negotiating Volumes of the Pentagon Papers, which were admitted in evidence in the Ellsburg/Russo trial but never actually published. Since the attorney in the FOIA suit, Charles Nesson, was also one of the attorneys in the Ellsberg criminal trial, he already has the full text of the volumes, but the State Department maintains that they are still under a protective order of the District Court in Southern California. In this situation, the plaintiffs as well as the government could submit the documents for *in camera* proceedings.

Still another variation occurs in *Halperin v. National Security Council*, #75-0675 (D.D.C.), which seeks the titles and numbers of all National Security Council Study Memoranda (NSSMs) and National Security Council Decision Memoranda (NSDMs) issued since 1969. In this case, the plaintiff — a former NSC staffer — knows and/or wrote not only the titles/numbers but many of the full documents in question. If a protective order were issued, the detailed arguments could be discussed in adversary proceedings.

Refusal to Confirm or Deny the Existence of Documents

The Freedom of Information Act is providing an interesting legal variation of the game known as refusing to confirm or deny — one which at a minimum adds an additional layer of confusion and delays in court. The government is in effect trying to establish in court an extra refinement above the usual three tiers of secrecy spelled out in the Executive Order.

The game has two set pieces: first, much of the information is already in the public domain (otherwise, no one would have known to ask for it under the FOIA), and, second, the government places extraordinary importance on being required officially to confirm its part in an operation, *i.e.*, "there is a difference in international affairs between rumor and speculation and official confirmation of governmental involvement in a particular activity."

This refusal to confirm or deny has come up in two FOIA suits dealing with the *Glomar Explorer*, one for the files on the financial arrangements for the vessel and the other for the CIA suppression of press coverage when the story first broke. The CIA has refused to acknowledge the existence of such records in spite of such facts as: 1) the CIA has had to admit ownership in tax court in California (*U.S. v. County of Los Angeles*, Civ. Action No. CV 75-2752-R (C.D. Cal.), 2) CIA involvement with the Glomar is not a secret to the U.S. public, given the extensive press coverage it ultimately received, and 3) CIA involvement was apparently not a secret to the Soviets either, since a Russian trawler evidently watched the sub-lifting operation long before the U.S. public had heard of it.

Military Audit Project v. Bush, a suit for the contracts and other financial arrangements behind the Glomar Explorer, initially produced some very good language about the need to litigate from a public record. The Court of Appeals upheld an order of the lower court and the government was required to submit documents ("if any") for *in camera* inspection, but with the provision that everything relevant to confirming or denying the existence of the documents would remain under seal.

However, Judge Gesell's *ex parte in camera* inspection of the documents resulted in his dismissing the case with a one-sentence order: "The complaint is dismissed for reasons stated *in camera*." (Order of Oct. 20, 1976.) The plaintiff's appeal to the circuit court apparently must be carried out while "stumbling around in the dark."

In *Phillippi v. CIA*, the suit for the suppression of press accounts of the *Glomar Explorer*, the need for a public record was given substantially less attention. District Court Judge Gasch in fairly short order denied the plaintiff's Vaughn motion and request to participate in *in camera* review of the government's affidavits, and granted summary judgment for the CIA.

The court of appeals, however, reversed and remanded the case — the CIA, it held, has the burden of proof establishing that CIA involvement with the ship is indeed a secret which can be neither confirmed nor denied, especially since the ownership of the vessel has already been established. The *Phillippi*

decision has provided clarification of a number of points (some of which are discussed below in the context of the (b)(3) exemption) but the critical one for a wide range of cases is that plaintiffs can insist that an agency must justify its position on the basis of a public record:

> *On appeal appellant does not assert that the Government may never claim that national security considerations require it to refuse to disclose whether or not requested documents exist. Reply brief at 9. Rather, her principal argument and the only question we decide, is that the Agency should have been required to support its position on the basis of the public record. [No. 76-1004 (D.C. Cir. Nov. 16, 1976) at 6]*

Once given a more substantial public record to work from, the plaintiff would be entitled to additional discovery, and the *Phillippi* court offered its suggestions:

> *. . . appellants discovery would presumably focus on the less than self-evident relationship between confirmation or denial of the existence of the records . . . and the disclosure, beyond that already made, of the "nature and purpose of the Program." For example, appellant might seek to learn the process by which it was determined that confirming or denying the existence of records relating to media contacts by the Agency would indicate more about the nature of the project than do the documents filed in* United States v. County of Los Angeles. *(At p. 11, fn. 12.)*

Credibility of Executive Branch Claims

Since the courts seem to be willing to "accord substantial weight" to the claims of the executive branch, the credibility of those claims becomes an important factor in the way that the FOIA will function. And since it appears that in the ordinary course of events, the documents will be withheld when the executive makes such claims, the public will have no way of gauging how those claims stack up against the actual contents of the documents themselves.

Klaus v. NSC, #751093 (D.D.C.) so far presents one of the clearest demonstrations of this problem. The lawsuit is for the release of the National Security Intelligence Directives (NSCIDs) which deal with the operating procedures of the CIA.

The government initially withheld the NSCIDs in toto, and made claims which seem decidely alarmist in view of those portions of the documents which were ultimately released. One of the affidavits of Jeanne Davis, Staff Secretary of the National Security Council, stated that NSCID 5, entitled "U.S. Espionage and Counterintelligence Activities," could not be made public because

> *The disclosure of the information contained herein could reasonably be expected to cause serious damage to the national security. Disclosure of NSCID number 5 could reasonably be expected to place the lives of individuals in immediate jeopardy. . . . References to coordination with other agencies could prompt attacks on our diplomatic personnel overseas as being spies and covert operators. (Affidavit of October 8, 1975).*

In June, 1976 the NSC made a surprise move and released NSCID 5 and all or part of several of the other NSCIDs sought in *Klaus*. It seems that the report of the Church Committee on intelligence activities had paraphrased their contents and mooted withholding the documents themselves. With NSCID 5 in hand, it is difficult to see how Davis' claims that lives would be endangered could be "reasonably expected" to follow the release of the document. Using the most general possible terms, NSCID 5 defines espionage and counterespionage, gives the Director of Central Intelligence the responsibility for coordinating clandestine activities, charges the CIA with responsibility for espionage and counterespionage abroad, and lays out a chain of command. It contains no references to the name of a specific foreign country, let alone an individual.

This case should demonstrate the temptations open to the government if the courts rely on executive branch affidavits for making their determinations, and it shows how the court's shyness about making their own determinations could well become a serious handicap to the FOIA. There is as yet no clear sense of how the courts intend to deal with the possibility that the executive branch, in order to keep anything at all secret, may decide that all they need to do is make an exaggerated claim of danger to the national security.

Information Exempted by Statute — (b)(3)

The (b)(3) exemption was the subject of the most recent amendment to the FOIA. This past summer, Congress overrode the Supreme Court's broad interpretation of the exemption in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975). In his concurring opinion in *Robertson*, Justice Stewart had stated that the only question for a court to decide was "the factual existence of such a statute [which permitted withholding of information from the public], regardless of how unwise, self-protective, or inadvertent the enactment might be." 422 U.S. at 270.

In the Government in the Sunshine Bill (Public Law 94-409, 90 STAT 1241), Congress changed the language of (b)(3) from covering any information "specifically exempted from disclosure by statute" to covering only information which is

> *specifically exempted from disclosure by statute, provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.*

This means that there are now three criteria justifying withholding information under the amended (b)(3). First, there must be a statute which authorizes or requires the withholding of information; second, the statute must designate specific kinds of information which fit the criteria for withholding; and third, the information requested under the FOIA must fit within the scope of the information which is authorized to be withheld.

In the area of national security information, there has been confusion over the scope of some statutes. In addition there is the problem of overlap with the (b)(1) exemption; few FOIA requests are denied on the grounds of (b)(3) alone.

The National Security Agency has a (b)(3) statute which effectively exempts it from the FOIA. And although the NSA has a policy to respond to FOIA requests, the public is not in a position to enforce its usual FOIA rights in court. A recent decision, *Kruh v. General Services Administration*, 75 C 909 (E.D.N.Y., Oct. 20, 1976) denied a request for the 1952 Truman Memorandum establishing NSA. For although NSA was established by executive fiat, Congress later provided it with a (b)(3) statute:

> *[N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency. [Public Law No. 86-36, 56, 73 Stat. 63 (1959)]*

Congress will have to determine, as recommended in the Church Committee Report, whether it wants to change the rules governing the NSA and end its supersecret status, but until then it cannot be taken into court under the FOIA.

The CIA has also tried to claim that it has the benefit of two (b)(3) statutes which would allow it the same broad authority for withholding as does the NSA (b)(3) statute. The first is 50 U.S.C. §403(d)(3), which was passed in the National Security Act of 1947 and which provided:

> *that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.*

And the second is 50 U.S.C. §403*g*, passed in the 1949 CIA Act:

> *in order to further implement the proviso of Section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of . . . any law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or number of personnel employed by the Agency.*

The legislative history of both the 1974 and 1976 amendments to the FOIA refer to 403(d)(3) and 403g as (b)(3) statutes. But what is primarily at issue is the breadth of the material that these statutes can be used to conceal. The CIA has used the "sources and methods" phrase to cover virtually everything that relates to it, including information which bears scant relationship to what Congress had apparently intended by the phrase "intelligence sources and methods" in 1947. If Congress in 1947 had intended such an expansive interpretation of "sources and methods," then the specific list of information dealing with personnel exempted in 403g would be nothing but an empty and unnecessary repetition of the 1947 provision.

By the same token, the CIA has claimed that

403g should be read to exempt it from disclosing any functions of the agency, rather than just the functions of the personnel employed by the Agency.

There have been a number of lower court decisions which have accepted the Agency's broad claims for either or both these statutes: *Phillippi v. CIA*, 419 F. Supp. 663 (D.D.C. 1975); *Bennett v. DoD*, 75 Civ. 5055-LFM (S.D.N.Y. September 10, 13, 1976); *Richardson v. Spahr*, 416 F. Supp. 752 (W.D. Pa. 1976), appeal pending; *Bachrach v. CIA*, CV 75-3727-WPG (C.D. Cal., May 13, 1976); and *Hayden v. CIA*, No. 76-284 (D.D.C., Oct. 18, 1976).

However, the D.C. Court of Appeals has since narrowed the use of §403(d)(3) and §403g dramatically. In *Phillippi v. CIA*, Civ. Action No. 76-1004 (D.C. Cir. Nov. 16, 1976), the court noted

> *that Congress has been peculiarly sensitive to expansive judicial interpretations of the exemptions to the FOIA. Through various amendments it has sought to insure that these exemptions not provide the means by which government agencies could eviscerate the policy of the Act. (At p. 3, fn. 4)*

The *Phillippi* court narrowed the sources and methods phrase to fall within the restrictions of the newly amended (b)(3):

> *Since information which could reasonably be expected to reveal intelligence sources and methods would appear to be classifiable,* see *Executive Order 11652,* supra *note 2, 3 C.F.R. at 340, and since the Agency has consistently claimed that the requested information has been properly classified, inquiries into the applicability of the two exemptions may tend to merge. (At p. 13, fn. 14)*

The court also stated that §403g is a (b)(3) statute but rejected the idea that it is so broad that it can be read as a complete exemption to the Freedom of Information Act; it narrowed that statutory authority to what had originally been Congress' intent—the right to conceal all information about its personnel.

In general then, the *Phillippi* court held that the CIA's §403(d)(3) is a (b)(3) statute which merges with (b)(1). Material will be related to "intelligence sources and methods" as Congress had intended originally only if that information is also classifiable under the provisions of Executive Order 11652.

Conclusion

There are problems in getting any statute to actually work, but even so the FOIA is functioning extremely well. In using the Act to monitor the "national security" operations of the executive branch, public access is handicapped primarily by the classification criteria that the courts are supposed to apply. The terms of Executive Order 11652 allow a judge to consider *only* possible damage to a loosely-drawn and often self-serving concept known as "national security interests." Neither the Executive Order nor any statutes currently take into account a countervailing interest — the right of the public to be informed about the kinds of operations which are being carried out in its name. For example, in many cases that we now know of, disclosure would have perhaps damaged an ongoing policy, but that policy has been one which the public would have been unwilling to support if they knew about it.

Congress, however, has not lost interest in the workings of the Act, as the amendments to exemption (b)(3) have shown. Ultimately, Congress (or perhaps even the courts) may decide to take on the political question and to balance the public's right to participate in the debate about national security policy.

But whether or not this happens, the Act is opening up some of the doors to what has been the executive branch's exclusive preserve. Although it is producing a mixed record of success and failure, litigation for national security information is accomplishing a number of things — it is bringing the debate into focus, narrowing some of the issues, experimenting with working definitions of national security claims, and calling attention to the problem of the public's right to information about major policy issues and government misconduct. Yet even without major additional changes, the FOIA is in fact staking out for the first time outer parameters of a permissible claim of national security secrecy. ■

In The News

October 27, 1976 A document obtained by the *Seattle Sun* revealed that the northwest chapter of the U.S. Labor Party (also called the National Caucus of Labor Committees, or NCLC) maintains regular contact with government law enforcement agencies in order to give them information about the activities of Left organizations. NCLC is otherwise best known for its campaign of harassment against prominent members of the Left. The Fifth Estate recently published a study which argued that the NCLC has financial and political connections in the intelligence community. *The Seattle Sun*, 10/27/76, p. 15)

November 3, 1976 According to the Justice Department, approximately 225 people have so far been notified of FBI COINTELPRO operations which have harmfully affected them. The Justice Dept. is unable to estimate how many people will eventually be notified following review of its COINTELPRO files, and no decision has been made regarding notification to persons affected by FBI programs other than COINTELPRO. (Letter to Jerry Berman, Center for National Security Studies)

November 9, 1976 Attorney General Edward H. Levi decided, that in spite of the fact that the Communist Party USA does not meet the Domestic Security Investigations requirement that a group be likely to engage in violent activities, the FBI will continue to surveil the Party. Because of the FBI's claims of ties between the Soviet Union and the CPUSA, the Bureau can continue its surveillance of the 4000-member party under the undisclosed, Top Secret Justice Department rules for investigating foreign intelligence activities. *(Washington Post*, 11/10/76, p. A10)

November 12, 1976 According to Ricardo Morales, an intelligence official for the Venezuelan secret police, Chile's secret police (DINA), offered arms and funds to two Cuban exiles to assassinate Andres Pascal Allende, the nephew of late President Salvador Allende and a member of MIR, a Chilean revolutionary group opposing the junta. One of the Cubans, Orlando Bosch, was charged in Venezuela with the bombing of a Cuban airliner. (*Washington Post*, 11/12/76, p. A8)

November 17, 1976 Philip Agee, former CIA employee and current critic, was issued the second deportation order by the British government to an American for the reason of "national security" risks. The Home Office, responsible for Britain's internal security, also handed a deportation order to Mark Hosenball, an American reporter for a London daily. Agee and others have speculated that pressure from the U.S. government, because of his association with Counter-Spy, is responsible for the deportation. In addition, James Angleton, former CIA counterintelligence chief, may have been indicating that the CIA had a role in the deportation when he remarked in a TV interview that "we are somewhat displeased" that Britain had allowed Agee a "safe haven." A member of Britain's National Union of Journalists stated, "These two men have been victimized by the Home Office for the crime of doing their job and doing it well, perhaps too well for the comfort of the authorities. It is the duty of journalists to disclose any matters of legitimate public concern." (*New York Times*, 11/18/76, and *Washington Post*, 11/19/76, p. A25)

November 18, 1976 In a deposition filed in $40 million damage suit filed by the Socialist Workers Party against the FBI for harassment of legitimate political activities", FBI director Clarence M. Kelley denied having received adequate information from his top aides concerning FBI burglaries of militant political groups; said Kelley, "I did not, however, probe to determine what they knew, nor did anyone volunteer any information". Kelley has had to revise statements about FBI burglaries several times — first stating that burglaries against domestic intelligence targets had ceased by 1966, and finally acknowledging burglaries occurring in April, 1973. (*Washington Post*, 11/19/76, p. A11)

November 18, 1976 In remarks before the Los Angeles County Bar Association Attorney General Edward H. Levi revealed to his "surprise" upon taking office at FBI agents' expectations that he "automatically" authorize warrantless national security wiretaps — thereby suggesting the ease with which such authorization may have been granted to both FBI and CIA agents by previous heads of the Justice Department. Since taking office, Levi has set up a group to review wiretap requests before reaching him for final decision. *(New York Times*, 11/19/76)

November 19, 1976 Ray S. Cline, former deputy director of the CIA for intelligence, proposed that the Central Intelligence Agency be terminated and replaced by a Central Institute of Foreign Affairs Research, which would conduct solely "analytical and scholarly research". The agency's spying and covert activities would be maintained by "small, truly secret" and camouflaged intelligence units scattered throughout different branches of the federal bureaucracy. According to Cline, the present CIA "operations" directorate is "a worldwide public relations liability." (*Washington Post*, 11/19/76, p. A8)

November 27, 1976 Six tapes resulting from a "quality control" program run by the government-owned Puerto Rico Telephone Company (Telco) have become the focus of a political espionage and illegal wiretapping scandal which may have tipped the scales in a close election campaign for the pro-statehood New Progressive Party of Carlos Romero Barcelo. Members of the Puerto Rican Socialist Party are believed to be the targets of the wiretapping authorized by Telco's president Salvador Rodriguez Aponte, former police chief known to advocate the use of wiretapping. The tapes, as yet unauthenticated, are currently being held by the special prosecutor. (*New York Times*, 11/27/76, p. L10)

November 28, 1976 Freedom of Information Act request by the Charleston Gazette, West Virginia's leading daily newspaper, has confirmed that the FBI kept elaborate files on newspapers both friendly and hostile to it, and that it applied pressure to "discipline" the latter. The Bureau's surveillance of the Gazette included monitoring of its editorials critical of the late FBI chief, J. Edgar Hoover; personal profiles of various Gazette staff members and editors; and Hoover's denial to the paper of any "information or assistance." Photocopies of the 150-page Gazette file imply the monitoring by the FBI of "scores or hundreds of other publications". (*New York Times*, 11/28/76, p. 44)

In The Literature

Government Publications

Investigation of Publication of Select Committee on Intelligence Report, Hearings before the Committee on Standards of Official Conduct, House of Representatives, 94th Cong., 2d Sess. (July and September, 1976). (Government Printing Office). The House Ethics Committee investigation into Daniel Schorr's publication of the Pike Committee's final report in the *Village Voice.* The volume includes testimony, the "red-lined" copy of the final report of the Select Committee as it appeared in the *Village Voice,* and affidavits in Mr. Schorr's support from various notable Washington figures.

Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579): Source Book on Privacy, Committee on Government Operations, United States Senate and the Committee on Government Operations, House of Representatives, Subcommittee on Government Information and Individual Rights (September 1976) (For sale by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 — $12.45).

Books

The American Police State: The Government Against the People by David Wise (Random House: New York 1976). Well-documented and containing many revelations new to the American public, this book is an engrossing description of what has been disclosed about Watergate and what the FBI, the CIA and the IRS have done and are probably still doing.

Articles

"Thinking the Unthinkable about the Nixon Scandal," by Renata Adler, *The Atlantic Monthly,* Dec. 1976. Reasoning from circumstances, cast of characters, coincidence, and documents, Adler comes to a convincing conclusion that the bottom line of the Nixon scandal was money; the crimes of Nixon's presidency were Treason and Bribery.

"It Was My Agent Calling," by Danny Schecter, Boston *Real Paper,* Sept. 25, 1976, pp. 26-34. Story of Yule Mahoney, a 25-year old alcoholic who was an FBI informer for 5 years; discusses the kinds of groups which were surveilled, the FBI's possible links with SAVAK (the Shah of Iran's secret police), and evidence that the FBI is still carrying on intelligence investigations in spite of the Attorney General's restrictive Guidelines on investigations of domestic political activity.

Conferences

National Conference on Government Spying. In Chicago, Jan. 21-23, 1977. Includes 3 days of Presentations, Workshops, and Information Exchange on Police "Red Squads," and FBI surveillance of political and community activists. Registration: $25.00, to be sent to National Conference on Government Spying, 33 N. Dearborn, #815, Chicago, IL 60602. For information, call Paul Bigman, (312) 939-2492.

In The Courts

October 20, 1976 *Kruh v. General Services Administration,* Civil Action No. 75 C 909 (E.D.N.Y.). In an FOIA suit to compel disclosure of the October 24, 1952 Memo from President Truman which established the National Security Agency, Judge Neaher upheld GSA's contention that information relating to NSA was exempted from disclosure by (b)(3) of the FOIA and Public Law 86-36.

November 3, 1976 *Marks v. CIA,* Civil Action No. 75-1735 (D.D.C.). In a Freedom of Information Act suit, Judge Howard Corcoran denied plaintiff's motion for *in camera* review of deletions from his personal files and held that the deletions were properly withheld under FOIA exemptions (b)(1), (b)(3), and (b)(7) — meaning that, in spite of the fact that the CIA has no law enforcement function, the FOIA exemption for law enforcement files in the context of a "lawful national security intelligence investigation" was applicable.

November 4, 1976 *Klaus v. Blake and CIA,* Civil Action No. 76-1274 (D.D.C.). In an FOIA suit for deletions from documents dealing with authorization for CIA covert actions abroad, Judge Gesell ruled that he would conduct no *in camera* inspection of documents when an "affidavit demonstrating that the documentary material claimed exempt on grounds of national security has been conscientiously re-examined by a classification officer and remains classified 'secret' or 'top secret.' " The court granted summary judgment to the government.

November 10, 1976 *Alliance to End Repression v. James Rochford,* Civil Action No. 74 C 3268 (N.D.Ill.). In a Chicago "red squad" suit, Judge Alfred Kirkland issued orders 1) enjoining the defendants from infiltrating the Alliance's legal team to gather information or using any information the defendants gathered by infiltration, and 2) placing, in view of defendants' destruction of documents, the burden of proof on the defendants to show that they had not infiltrated, provoked, and defamed the Alliance; the Alliance's allegations have been admitted as *prima facie* evidence.

November 10, 1976 *Stern v. Department of Justice,* Civil Action No. 76-2082. NBC correspondent Carl Stern filed suit against the Department of Justice in order to force the Department to rescind its approval of the FBI's notice in the Federal Register describing "the existence and character of each system of records the agency maintains." Stern alleges that the FBI's listing of only nine file systems does not comply with the law (Privacy Act, 5 USC 552a (e)(4)).

NOTICE: COINTELPRO VICTIMS

The Justice Department has now notified 225 people that they have been the victims of a COINTELPRO operation which may have caused some harm. These individuals have received letters hand-delivered by a U.S. Marshall and can receive on request a copy of the documents detailing the operations against them. The ACLU's Project on National Security and Civil Liberties would like to get in touch with those who have received such notices. If anyone has received such a notice or knows someone who has, they are asked to contact Morton H. Halperin, Director, Project on National Security and Civil Liberties, 122 Maryland Avenue, N.E., Washington, DC 20002.

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Point Of View

(continued from page 16)

those who were non-white or who preached "leftist" doctrines did not fare as well.

Those who have been tortured in the jails of Chile, Iran, and South Korea will have difficulty understanding the claim that the CIA is incompetent. The CIA still claims credit for putting the Shah of Iran into power; it is more modest in Chile only because of public attitudes toward the suppression of freedom, but its role there is clear. There are in fact few areas of the world where the CIA has not had a significant impact — almost always with the result that there was less freedom and equality than there might have been.

The FBI at home has been no more benign or ineffective. Its impact on middle class whites was not always without permanent consequences for individual lives. Members of the Socialist Workers Party, the Communist Party, the Klu Klux Klan, and other groups had their lives disrupted, lost their jobs, saw their marriages destroyed because of the activity of the FBI. And it is impossible now to determine just how great an effect FBI harassment had on the anti-war movement in the United States. From the very first stirrings of opposition to the war, the FBI was there infiltrating, spying, manipulating, and disrupting. Politically, who can say whether the war would have been ended sooner or whether the effects of the peace movement would not have been more permanent had it not for intelligence agency manipulation of the political action of millions of Americans.

Black enemies of the FBI were not treated so genteely as were the white anti-war movement. The growing documentation on the FBI war — no other word will do — on the black nationalist movement in the United States was a "no holds barred" effort and one that was spectacularly successful. The FBI objectives were spelled out with great clarity in the memorandum establishing the Black Nationalist COINTELPRO. The objectives were to prevent a coalition, the rise of a "messiah," growth of the movement, and to deny it respectability. (The FBI memo adds a fifth objective — to prevent violence — but the documents make it clear that this must have been a long term goal, because in the short run the Bureau sought to promote violence).

In last month's *First Principles* we presented one case study — the killing of Fred Hampton. There are many more such tales; some are known, some are discernable in the censored documents dragged from the FBI, and others are still buried. It will be impossible to undo the effects of COINTELPRO Black. On one level, all we can do is to try to see to it that the FBI leaves them alone and instead protects them from harassment.

There are, however, two specific steps that can be taken. The Black Panthers have filed a law suit and SNCC is planning to file; these suits deserve wide support. More urgently, there are now individuals in jail on probation or under indictment at least partly because the FBI instigated and promoted violence and other illegal acts. One way for the Carter Administration to show that it understands the evil done by the intelligence agencies and the need to make amends would be to create a special body, with representation from the wide political spectrum, which would have full access to examine all such cases and could make recommendations for pardons. ■

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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON, MAY 13, 1798

Point
Of View

They Do Shoot Straight

MORTON H. HALPERIN

The early reviews suggest that, however unintentionally, David Wise's important new book *The American Police State* will lend credence to a misleading and dangerous view of the intelligence agencies. This is the notion that the FBI and the CIA most resemble Jimmy Breslin's gang-that-could-not-shoot-straight, that they have bumbled around, behaved in illegal and undesirable ways but have not really done much harm.

There is some evidence to suggest that the intelligence agencies are engaged in one of their disinformation campaigns against the American people to implant this image in our consciousness. Why should one worry about agencies who have nothing better to do than investigate the harmless Socialist Workers Party, or try unsuccessfully to have Castro's beard fall off in public?

The cannot-shoot-straight image got a substantial boost from the Church Committee Report on the Assassination of foreign leaders. The fact that the CIA could not be "credited" directly with a single assassination and the spectacle of multiple but futile efforts to kill Castro helped to shape this image of ineffectiveness.

Wise reinforces this image by focusing on individuals who were harassed but not permanently harmed. William Van Cleave, a Pentagon official, was forced to take a lie detector test or face the loss of his clearances. He took the test, passed, and still lost his clearances — for a while. But he is still teaching and consulting. Leslie Bacon was illegally imprisoned for several months while the government pretended to be investigating her role in the bombing of the capitol and her case does well illustrate the evils of the current grand jury system. However she appears to have come out of the incident with no lasting effects.

And Wise begins his book with a detailed and illuminating examination of the Kraft wiretap and the seventeen Kissinger taps. I would be the last to deny the importance of these violations of privacy — but all eighteen of us, including this writer, are doing very well, thank you.

Not so all of the victims of the intelligence agencies at home or abroad. In many cases the intelligence agencies succeeded in doing what they set out to do and their victims have suffered grievously as a result. Middle class, moderate, white "enemies" of the intelligence agencies came off relatively unscathed, but

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